No. 08-1138

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In The

Supreme Court of the United States

AUREUS HOLDINGS, LTD. and DONALD SCHULTZ,

Petitioners,

v.

THE CITY OF DETROIT and JAMES DOCKERY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. WHETHER PETITIONERS HAVE FAILED TO PRESENT A TRUE CONFLICT BETWEEN THE SIXTH CIRCUIT OPINION AND *PAYTON v. NEW YORK*, 445 U.S. 573 (1980), OR COMPELLING REASONS TO WARRANT REVIEW WHEN THE EVIDENCE SUPPORTED THE JURY VERDICT THAT DOCKERY DID NOT VIOLATE THE FOURTH AMENDMENT BECAUSE UNDER THE TOTALITY OF THE CIRCUMSTANCES PROBABLE CAUSE EXISTED TO SEIZE THE SHOTGUN IN PLAIN VIEW IN A BUSINESS.

II. WHETHER PETITIONERS HAVE FAILED TO PRESENT COMPELLING REASONS TO WARRANT REVIEW OF THE PETITION WHERE THE SIXTH CIRCUIT'S OPINION AFFIRMING THE DISTRICT COURT'S DISMISSAL OF PETITIONERS' CLAIMS AGAINST THE CITY DOES NOT RAISE A CONFLICT WITH *MONELL v. DEPARTMENT OF SOCIAL SERVICES*, 436 U.S. 658 (1978), AS THE SIXTH CIRCUIT CORRECTLY HELD THAT PETITIONERS FAILED TO PROVE OR TO CREATE A GENUINE ISSUE OF MATERIAL FACT OF THE EXISTENCE OF A CUSTOM OR DE FACTO POLICY THAT RESULTED IN THE VIOLATION OF CONSTITUTIONAL RIGHTS.

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COUNTER-STATEMENT OF NATURE OF THE CASE

This is a civil rights action filed under 42 U.S.C. §1983, and the Second, Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

This case arises out of Petitioner Aureus Holdings, Ltd. (Aureus), a scrap metal processor, and Petitioner Donald Schultz (Schultz), an employee of Aureus, claims against the City of Detroit and Respondent James Dockery, a Detroit Police Officer assigned to the Detroit Environmental Enforcement Police Section called (DEEP) of the Detroit Police Department for issuing numerous citations against Aureus and Schultz which Petitioners assert were without probable cause. Petitioners also complained that Respondent Dockery in other ways harassed Petitioners under a de facto policy approved by Respondent City which deprived them of their rights and seized Shultz's shotgun without a warrant. (Petition Appendix (Pet. App.) A, p. 2a, Pet. App. C, p. 30a).

Petitioners appeal the jury verdict of no cause of action in favor of Respondent James Dockery. Petitioners also appeal the district court's grant, in part, of Respondents' Motion for Summary Judgment which dismissed the City of Detroit. (Pet. App. C, p. 50a).

Petitioners' seven-claim Complaint alleged the violation of the Second and Fourteenth Amendment for illegally seizing a shotgun, (First Claim, Schultz); violation of the Fourth and Fourteenth Amendments for illegally seizing the shotgun, (Second Claim,

Schultz); and deprivation of a property interest without due process of law in violation of the Fourth, Fifth and Fourteenth Amendments for allegedly revoking the business license and failing to renew the license, contrary to the City Code. (Seventh Claim, Aureus against the City).

On December 19, 2005, Respondents filed a Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56(c). The district court granted in part the Respondents' Motion and dismissed Petitioners' Second Amendment claim (First Claim), and all claims against the City of Detroit (Seventh Claim). (Pet. App. C, pp. 32a, 48a-50a, 51a).

On July 23, 2007, following a five-day (5) jury trial, a jury returned a verdict in favor of Respondent Dockery and against Petitioners. The jury found for Dockery on Aureus Holdings, Ltd.'s malicious prosecution claim and tortious interference with business claim, and on Schultz's claim for violation of constitutional rights in seizing a shotgun and his malicious prosecution claim. (Pet. App. A, p. 14a).

Petitioners filed a Motion for New Trial pursuant to Fed. R. Civ. P. 59(a) on the ground that the verdict was against the weight of the evidence. The district court denied the Motion for New Trial. (Pet. App. A, p. 2a, Pet. App. B, p. 23a). In the Petitioners' Motion for New Trial Petitioners argued that the verdict against Aureus and Schultz was against the clear weight of the evidence. Further that the district court erred in

granting summary judgment in favor of the City. (Pet. App. A, p. 2a).

COUNTER-STATEMENT OF FACTS

Background

This litigation arises from the Petitioners' operation of a metal recycling business at 17245-17287 Mt. Elliott in the City of Detroit. Petitioner Aureus Holdings, Ltd., is a Michigan corporation which did business as Magnum Recycling, Inc. Petitioner Donald Schultz was an employee of Aureus and also a trucking company named E & M Transportation.

Respondent James Dockery is a 28-year veteran of the City of Detroit Police Department, who was assigned to the Detroit Environmental Enforcement Police section (DEEP) of the department during the events underlying this action.

The events giving rise to the Petitioners' claims arise from the issuance of a series of separate enforcement citations and investigative visits to the Petitioners' location by Dockery. Between May and December 2001 Dockery issued 26 separate citations to companies or individuals he found at the Mt. Elliott location. Ten of the citations were specifically issued to Aureus by name or Magnum Recycling; six were issued to Schultz. (Pet. App. C, pp. 34a, 38a, 39a, 43a).

Generally, Dockery issued citations to Aureus/Magnum for violations of City ordinances such as failure to have a Building Department issued Certificate of Occupancy to conduct a metal recycling business, or a properly issued City of Detroit business license or for violations of state or city environmental laws and regulations because industrial and hazardous waste oil was being dumped on the ground at the facility. The citations to Schultz contained similar charges.

Nine of the citations came on for hearings before Judge David S. Robinson Jr. of the 36th District Court for the City of Detroit, handling the court docket for environmental citations. The parties undertook negotiations to resolve them through settlement. Ultimately, on November 6, 2003, with the court's encouragement, the parties agreed to a resolution of nine specifically listed citations by an agreement that Respondents would remediate the environmental violations by installing underground storage tanks to receive any waste oil draining from the recycled metal. (Pet. App. C, p. 42a).

Facts Surrounding the Citations

May 17, 2001

Aureus entered into an agreement with Consumers Scrap (Consumers) in early 2001 for the lease and purchase of the Scrap Yard and Magnum trade name. Aureus took control of operations under a lease in

April, 2001. Aureus began operating the Scrap Yard without a license. (Pet. App. C, pp. 33a-34a).

Metal shavings are among the materials delivered to the Scrap Yard from automobile manufacturers. Metal shavings are coated with cutting oil. Some oil drains into the ground when the shavings are deposited at the Scrap Yard.

On May 17, 2001, Officer Dockery completed a follow-up investigation of a business near the location of the scrap yard at Mt. Elliott. He observed the name Consumers Scrap/Magnum on the sign at Petitioners' location. Because he recalled Consumers Scrap had a number of environmental problems in the past, he decided to observe the location to determine the current status of the business.

Officer Dockery looked around the location and observed piles of metal shavings and a "oily substance running down off the shavings" to the front of the property to the City sewer. (R. 54, Trial Tr. 7/19/07, pp. 19-23).

Aureus had never applied for a business license in its own name. (Pet. App. C, p. 33a). After an investigation of the existence of the license, Dockery issued Thomas Pallisco Thomas a citation for operating the scrap yard without a business license, for failing to have a certificate of occupancy which Dockery discovered from the Building and Safety Department, and for violations of state and local laws for illegal dumping and improper disposal of waste oil. The oil was

being dumped on the ground and draining into the public sewer system.

Once Dockery left the scrap yard, he contacted the Consumer Affairs Department to determine the status of the license and found out that the Consumers Scrap license expired in 2000 and found no record of a license for Aureus.

May 25, 2001

On May 25, 2001, despite the lack of a license, Petitioner Schultz and James Behm opened the Scrap Yard. Dockery drove by the premises to make sure Petitioners had received a license, made some observations and took photos. (Pet. App. C, p. 33a). Petitioners had not received a license but claimed they were operating under a transfer license from Consumers, but Consumers' license had expired in 2000 and there is no proof that the Detroit City Code provided for a transfer. (Pet. App. C, p. 34a).

Dockery issued to Donald Schultz, the manager of the facility, two citations for operating without a certificate of occupancy and for operating a transfer station and business without a license, and one to Aureus, for the improper disposal of waste oil.

On June 16, 2001, Aureus received a license retroactive to April 1, 2001.

September 12, 2001 – The Shotgun

On September 12, 2001, Dockery entered the office at the Scrap Yard to follow up on the progress of the facility after the court date and observed what he considered to be violations similar to what he had issued the citations for previously. On that day, Schultz was working but denied he was the manager of the facility. Another man and Schultz went back and forth as to who the owner was. Dockery asked Schultz for identification, but Schultz refused to provide it.

A shotgun was in plain view in the office. (Pet. App. B, pp. 23a-24a); (See generally Pet. App. C, pp. 36a-37a). Dockery testified he asked Schultz who owned the shotgun and that he believed Schultz stated he owned it. Schultz still refused to provide identification or to provide proof that he owned the shotgun. Dockery believed that he could not leave an illegal sawed-off shotgun at a place of business where no one identified himself as the owner of the premises or as the facility manager or provided proof of ownership of the shotgun. The gun was not in a back office but near a front office in plain view. Since no one proved ownership Dockery considered it abandoned at the location.

Dockery took the shotgun to the 11th Precinct and invited Schultz to follow him. Schultz followed him to the station. Schultz spoke to the lieutenant, showed the lieutenant his identification and informed

the lieutenant that he was the manager of the facility, and Schultz's gun was returned to him.

Dockery wrote three citations to Schultz for: (1) failure to remove a hazardous condition (2) failure to provide identification for an investigation (3) and the improper disposal of waste. Dockery observed 50 gallons of anti-freeze draining on the ground, which could run into the sewers. Dockery did not issue a citation to Schultz for the shotgun because Schultz finally proved his identity and that he was the owner.

Dockery was hopeful that the June meetings and court hearings would have led to a change in the operations of the Scrap Yard once Petitioner Aureus agreed to have the new tanks installed, but he saw no change in operations.

December 20, 2002

On December 20, 2002, Dockery went to the Scrap Yard. A Detroit Consumer Affairs representative, Mr. John Fuqua came to the location also. Investigator Fuqua removed the business license and left. (Pet. App. C, p. 44a; R. 54, Trial Tr. 7/19/07, pp. 86-89). Dockery had nothing to do with the removal of the license. Consumer Affairs indicated that it was issued in error and that it should not have been issued.

Michigan Department of Environmental Quality and Detroit Water and Sewage Inspections and Violations

During the relevant time period Aureus/Magnum was also the subject of inspections by the State of Michigan Department of Environmental Quality (MDEQ) and the Detroit Water and Sewage Department (DWSD). City Ordinance 3496 prevents oils from being dumped into the sewer which go towards the sewage plant. As a result of the anonymous complaint received by MDEQ which stated Aureus was involved in "scrap metal facility dumping fluids" and stated other environmental violations at the scrap yard, a Pollution Emergency Alerting System (PEAS) Incident Report Form was filed on two occasions.

Bennie Howard, an employee of Detroit Water and Sewage Department (DWSD), and Michigan Department of Environmental Quality (MDEQ) representative, Jeanette Noechel, conducted a joint visit and inspection of the premises on November 13, 2002, which ultimately led to the issuance of an extensive December 13, 2002 "Letter of Warning" by the (MDEQ) State to Magnum, Aureus and E & M Transportation, detailing fourteen specific violations of state law. Their observations at the scrap yard of pools of liquid waste and other conditions, coupled with the samples taken from the pools of liquid waste on the ground that could be discharged into the sewer, indicated that Aureus/Magnum was in violation of the

City Ordinance which prevents dumping of waste oil into the City sewer.

Ms. Noechel's inspection found violations for the facility and testified that if the kind of conduct that she observed in November 2002 occurred in May 2001 when Dockery issued the citations, Aureus' actions were illegal. (Pet. App. C, p. 43a).

REASONS FOR DENYING THE PETITION

The Court should deny the Petition for a Writ of Certiorari and the Sixth Circuit Court of Appeals Opinion should stand. The Petition presents no compelling reason supporting the exercise of the Court's jurisdiction.

The Sixth Circuit's decision does not conflict with the United States Supreme Court decision of *Payton v. New York*, 445 U.S. 573 (1980). Petitioners try to inflate the impact of this case into one presenting an important federal question regarding the parameters of the seizure of a shotgun in a business which received several environmental law citations in plain view, but it is nothing of the sort. The Sixth Circuit Court of Appeals correctly determined that the jury was properly instructed on the law and they were entitled to conclude that the temporary seizure was not so unreasonable as to have violated Schultz's constitutional rights. The jury verdict was not plainly unreasonable and the district court's

denial of the motion for new trial was not an abuse of discretion.

In the district court and in the Sixth Circuit, Petitioners did not present the specific argument that a seizure of a visible weapon in plain view violated the Fourth Amendment unless it is associated with criminal activity in light of *Payton*. Therefore, since the Petitioners did not raise this specific issue in the Sixth Circuit the argument is waived. See *Thurman v. Yellow Freight Systems*, 97 F.3d 833, 835 (6th Cir. 1999).

The holding of *Monell v. Department of Social Services*, 436 U.S. 658 (1978), is not in conflict with the Sixth Circuit Court of Appeals' decision. The Sixth Circuit's position is that Aureus did not submit evidence to create a genuine issue of material fact of a de facto policy or custom in the instant case. The Sixth Circuit's opinion in no way challenges or conflicts with, expands or limits the scope of *Monell's* holding as Petitioners argue in an attempt to manufacture a conflict with the holding of the seminal case. To the contrary, the Sixth Circuit's decision is entirely consistent with all relevant precedent and was premised upon well-settled principles of law consistently applied by courts.

Petitioners merely disagree with the court's determination that the evidence presented by Petitioners did not establish a "custom" or a "de facto policy" or create a genuine material issue of fact of the same. Accordingly, this legal issue and the factual

circumstances of this case do not warrant review by the Court.

I. THE SIXTH CIRCUIT COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN AFFIRMING THE JURY VERDICT THAT DOCKERY'S SEIZURE OF THE SHOTGUN DID NOT VIOLATE THE FOURTH AMENDMENT AND UNDER THE FACTS OF THIS CASE REVIEW IS NOT WARRANTED AS THIS CASE DOES NOT CONFLICT WITH *PAYTON v. NEW YORK*.

The Sixth Circuit correctly affirmed the jury verdict which found a no cause of action on Petitioner Schultz's Fourth Amendment seizure of the shotgun claim. The court reviews a district court's denial of a motion for a new trial under the highly deferential abuse of discretion standard. *Taylor v. Teco Barge Line, Inc.*, 517 F.3d 372 (6th Cir. 2008). The Sixth Circuit will find an abuse of discretion only when it has a definite and firm conviction that the trial court committed a clear error of judgment. *Radvansky v. City of Olmsled Falls*, 496 F.3d 609, 614 (6th Cir. 2007). New trials are not to be granted on the ground that the verdict was against the great weight of the evidence unless the verdict was unreasonable. Thus, if a reasonable juror could reach the challenged verdict, a new trial is improper. *Taylor*, *supra*, quoting *Barnes v. Owens-Corning Fiberglas Corp.*, 201 F.3d 815, 820-821 (6th Cir. 2000) (citations omitted). A verdict is not unreasonable simply because

different conclusions could have been drawn or different results are more reasonable. *United States v. L.E. Cook Co., Inc.*, 991 F.2d 336, 343 (6th Cir. 1993); *Woodbridge v. Dahlberg*, 954 F.2d 1231, 1234 (6th Cir. 1992). Accordingly, unless a jury verdict is unreasonable and against the clear weight of the evidence, and not merely if a panel might have adjudged the issues differently, the district court's denial of a motion for a new trial will stand. See *Bell v. Johnson*, 404 F.3d 997, 1003 (6th Cir. 2005).

The trial court properly determined it had no basis to reverse the jury verdict and the jury's decision was not unreasonable. (Pet. App. A, pp. 3a-4a, Pet. App. B, pp. 23a-24a). Even if the district court or the Sixth Circuit would have reached a different conclusion it was not within the court's province to reverse the jury's verdict in this case.

"Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979). In *Crockett v. Cumberland College*, 316 F.3d 571 (6th Cir. 2003), the Sixth Circuit stated:

> The probability of criminal activity is assessed under a reasonableness standard based on "an examination of all facts and circumstances within an officer's knowledge at the time of an arrest." *Estate of Dietrich v. Burrows*, 167 F.3d 1007, 1012 (6th Cir. 1999); see also *Hunter v. Bryant*, 502 U.S. 224, 228,

> 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) ("The court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be construed . . . after the fact."); *Klein v. Long*, 275 F.3d [544] at 550 [(6th Cir. 2001)] ("Probable cause is assessed 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight[.]' "); *Gardenhire [v. Schubert]*, 205 F.3d [303,] at 315 [(6th Cir. 2000)]; . . .

In the case at bar, Officer Dockery asked Donald Schultz who was in charge of the Aureus' scrap yard. Aureus had been charged with various environmental offenses and failure to operate with a business license. Schultz indicated that not only was he not in charge, but told Officer Dockery that another employee at the location was the manager. As it turned out, Schultz was blatantly lying to Dockery because Schultz was indeed the manager of the subject scrap yard. Dockery testified that Schultz refused to produce any identification and that he ascertained that Schultz was fabricating once he spoke with the employee who informed Dockery that Schultz was the manager. Dockery observed a loaded short barreled shotgun, with a pistol grip in plain view in the office area where it could be reached by virtually anyone in the office area. He asked Schultz who owned the gun, and Schultz claimed it belonged to him. Dockery then asked Schultz for identification, and to show proof of

ownership and Schultz refused. Dockery believed the weapon was an illegal sawed-off shotgun. (Pet. App. C, p. 37a; Pet. Brief, p. 14).

Dockery inadvertently came upon the shotgun in the business while asking for the owner of the premises due to his observations of continuing environmental violations despite the agreement made in court to remedy the violations. It was reasonable for Dockery to seize the sawed-off shotgun which was in plain view when Dockery was lawfully on the grounds observing the continuing environmental violations. Probable cause exists to seize the sawed-off shotgun if the incriminating nature of the sawed-off shotgun was immediately apparent. *United States v. Truitt*, 521 F.2d 1174, 1177 (6th Cir. 1975). In *Truitt*, the Sixth Circuit held that "as far as sawed-off shotguns are concerned, probable cause to believe that they are contraband is immediately apparent and that such 'intrinsically incriminating' items may be seized without further investigation into whether such weapons are registered as required by federal or state law." *Id.* If Schultz would not provide identification, he certainly did not provide proof of registration of the item. The totality of circumstances warrant seizure of the sawed-off shotgun. See *United States v. Szymkowiak*, 727 F.2d 95, 98 (6th Cir. 1984). In *Truitt*, the court recognized that there are "so few legitimate uses for a sawed-off shotgun there is a probability that the weapon is not registered." *Id.* at 1177. Further, the Sixth Circuit held that a sawed-off shotgun in private hands is not an intrinsically

innocent object, therefore, the possession of it is a serious crime except under extraordinary circumstances. Therefore, under the totality of the circumstances, Dockery's observation of the sawed-off shotgun in plain view would have warranted on officer of reasonable caution in the belief that the weapon is illegally possessed. *Id.* In *United States v. Dunlap*, 209 F.3d 472, 478 n. 12 (6th Cir. 2000), the court took note that sawed-off shotguns are extremely dangerous and usually have no purpose other than the furtherance of illegal activity. Hence, Dockery's actions were reasonable as probable cause existed to seize the weapon. The jury verdict was reasonable based on the evidence before it and was not against the great weight of the evidence as Petitioners contended in the Sixth Circuit.

Of course, Schultz's version of what occurred was different than Dockery's, creating a classic question of fact to be determined by the jury. There is little question that reasonable jurors who chose to believe Dockery could find that probable cause existed for checking ownership of the loaded sawed-off shotgun and for failure to produce identification.

The seizure was reasonable under the circumstances when no one identified themselves as owner of the scrap yard and Schultz refused to provide identification or proof of ownership of the shotgun that was not in a locked and secured place. It was visible and accessible to the public. Dockery's actions were minimally intrusive. On the very day of the incident Dockery and Schultz went to the police station to

determine ownership of the gun. Schultz then produced identification to the lieutenant and the shotgun was returned to him, the very same day. Officer Dockery's actions were reasonable when Schultz was not cooperative and an unclaimed sawed-off shotgun was on the premises.

The lynchpin of the Fourth Amendment is reasonableness: it forbids the unreasonable seizure in violation of the Fourth Amendment. The reasonableness of a seizure is determined on a case-by-case basis by weighing the governmental interest that justifies the seizure against the degree of intrusion upon personal autonomy the seizure entails: the greater the intrusion, the greater the governmental interest needed to justify it. *Terry v. Ohio*, 392 U.S. 1, 20-21 (1989). The facts to be considered in weighing the competing interests are those "available to the officer at the moment of the seizure." *Id.* at 21-22.

Dockery's actions were reasonable when balanced under the circumstances and the facts he had knowledge of at the time of the seizure. Dockery was investigating environmental offenses with uncooperative persons operating without a license. The visibility of a shotgun was a danger to citizens. Even if Schultz stated the shotgun was his, Officer Dockery was under no obligation to believe that the gun belonged to him without proof of ownership and identification documentation from Schultz. The determination of reasonableness is made by balancing "the gravity of the public concerns served by the

seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." See *Illinois v. Lidster*, 540 U.S. 419 (2004) (police investigated a hit and run homicide days later, set up a roadblock and questioned drivers for information-seizure of a driver for driving under the influence (DUI) was reasonable and did not violate the Fourth Amendment although police had no reason to believe drivers had information of the crime, but observed the driver DUI).

Dockery's belief that the gun was an illegal modified "sawed-off" shotgun was reasonable under the circumstances and the jury was entitled to believe the credibility of his testimony. The decisions of *United States v. Gonzalez*, 334 F. Supp. 2d 275 (E.D. N.Y. 2004), and *United States v. Mines*, 883 F.2d 801 (9th Cir. 1989), do not provide a basis to support the existence of a compelling reason to grant review of this Petition or to establish that the Sixth Circuit Court of Appeals' decision is in conflict with *Payton v. New York*. *Gonzalez* recognized that an object may be seized without a warrant if the police are lawfully in a position to view the object and believe its incriminating character is immediately apparent. *Gonzalez* found that the seizure of photographs from a home was unreasonable when the police officers were unaware of its incriminating character until after the seizure. Here in the instant case, Dockery viewed a sawed-off shotgun in plain view, unclaimed by anyone on a premises with numerous environmental

violations. The danger of a shotgun was readily apparent especially when one does not know if the gun was registered and no registration or ownership information was forthcoming.

This is not a case that contradicts with the holding of *Payton* on legal or policy grounds. This is a case in which the jury determined that Dockery's actions under the totality of the circumstances were reasonable.

II. THE SIXTH CIRCUIT CORRECTLY AFFIRMED THE GRANT OF SUMMARY JUDGMENT TO THE CITY BECAUSE PETITIONERS FAILED, AS A MATTER OF LAW, TO CREATE A GENUINE ISSUE OF MATERIAL FACT THAT THE CITY HAD AN UNCONSTITUTIONAL DE FACTO POLICY OR CUSTOM WHICH RESULTED IN THE DEPRIVATION OF PETITIONERS' CONSTITUTIONAL RIGHTS.

The Sixth Circuit correctly affirmed the district court's grant of summary disposition to the City because Petitioners failed to prove the City of Detroit adopted a custom or de facto policy which resulted in the deprivation of Petitioners' rights. Petitioners failed to show a custom deliberately chosen to be followed by final policy makers of the City of Detroit which deliberately decided not to follow the City's procedures and caused a violation of constitutional rights. Petitioners failed to establish a City custom

which resulted in or was affirmatively linked to the deprivation of Petitioners' constitutional rights.

A. The Sixth Circuit's Affirmation of the Trial Court's Grant of Summary Judgment of Petitioners' Procedural Due Process Claim Was a Correct Interpretation of *Monell v. Department of Social Services* and the Correct Application of its Standard to the Case.

Aureus claimed that the City of Detroit deprived it of its procedural due process right to the license when it revoked its purported license and after returning it, failed to renew it in contravention of the City code and in its own policy (Pet. App. A, p. 10a, Pet. App. C, p. 5a). The Petitioners alleged the City through its Department of Consumer Affairs, "instituted a de facto policy of deliberate indifference in ignoring prescribed procedure in confiscating, then failing to renew, the business license of Aureus without due process of law". (Pet. App. A, p. 11a).

The Sixth Circuit correctly interpreted and applied the seminal case of *Monell v. Department of Social Services*, 436 U.S. 658 (1978). The Sixth Circuit and the district court's correct holdings did not challenge or conflict with *Monell*. The decisions recognized that a municipality may be liable under §1983 upon execution of a government's policy or custom which caused the alleged constitutional violation. (Pet. App. C, p. 48a). Further, the district court's decision

recognized that a local government can be liable when a government action is "so permanent and well settled as to constitute a custom or usage with the force of law, or when the government's official policy is the moving force of the constitutional violation" (citation omitted) (Pet. App. C, p. 49c). The opinions indicated that Petitioners failed to prove a custom or de facto policy and therefore the City was correctly dismissed. (Pet. App. A, pp. 11a-12a). Petitioners disagree with the Sixth Circuit and district court holdings that Petitioners failed to present genuine issues of material facts sufficient to prove their claim of the existence of a custom or de facto policy under *Monell*. Therefore, no true conflict exists and the district court and Sixth Circuit decisions do not contradict, narrow or undermine the seminal case of *Monell*.

Petitioner Aureus failed to identify, plead or prove a specific municipal policy or custom deliberately chosen to be followed by final policy makers of the City of Detroit to encourage the taking of licenses without due process of law. Petitioners failed to prove that the City of Detroit adopted a de facto policy or custom of malicious prosecution or taking business licenses without justification which resulted in the deprivation of constitutional rights. Lastly, Petitioners failed to prove or establish evidence that a city de facto policy or custom, resulted in, or was affirmatively linked to, the deprivation of Petitioners' constitutional rights. In order to prevail in a civil rights suit filed against a city or other governmental

entity, the Petitioners must allege and prove that the governmental entity had a policy or custom, the execution of which caused injury to the Petitioners and violated his or her constitutional rights. See *Monell v. Department of Social Services*, 436 U.S. 658, 692 (1978); *Stemler v. City of Florence*, 126 F.3d 856, 864 (6th Cir. 1997), cert. denied, 118 S. Ct. 1796 (1998).

Municipal liability attaches "*only where*" the policy or custom originates with the decision maker possessing the final authority to establish municipal policy with respect to the action ordered, and only where a deliberate choice to follow a course of action is made from among various alternatives by a decision maker with respect to the subject maker in question. *City of Canton v. Harris*, 489 U.S. 378, 390, 396 (1989); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-481 (1986). There is no evidence that a de facto policy arose or that the policy originated with Respondent Dockery, who is a low level employee who does not make policy, or that it originated with a high official. Petitioners did not identify officials who had the final policy making authority and, therefore, the City is not subject to municipal liability. *Pembaur v. Cincinnati*, *supra*; *O'Brian v. City of Grand Rapids*, 23 F.3d 990, 1001 (6th Cir. 1997).

In the instant matter, Petitioners submitted no proof of the existence of a constitutionally offensive custom or de facto policy which represents a course of

action deliberately chosen by policy making authorities, and which is also causally connected to any asserted civil rights deprivation suffered by Petitioners. An act performed pursuant to a practice that has not been formally approved by an appropriate decision maker may fairly subject a municipality to liability only where that practice is so persistent and widespread as to have the force of law. *Gregory v. Shelby County*, 220 F.3d 433, 441-442 (6th Cir. 2000).

Additionally, Petitioners must also establish that such a de facto practice is deliberately indifferent to the rights of others. To be deliberately indifferent, the subject policy must be so "patently egregious" as to "shock the conscience". Whether written policy, or de facto practice, the standard of what is deliberately indifferent is very high. "Deliberate indifference" sufficient to support a §1983 action against a municipality is a stringent standard requiring proof that the government entity disregarded a "known or obvious risk." *Patterson v. City of Cleveland*, 173 F.3d 429 (6th Cir. 1999). Further, a custom or practice which does no more than enable errant conduct is similarly insufficient. *Pembaur v. Cincinnati, supra,* n. 11. See *Waters v. City of Morristown, TN*, 242 F.3d 353 (6th Cir. 2001); *Searcy v. City of Dayton*, 38 F.3d 282 (6th Cir. 1994).

There is no evidence of the existence of a de facto policy or persistent pattern of the City harassing scrap yard businesses without due process, or revoking licenses, which was the moving force behind an alleged unconstitutional deprivation of Petitioners'

property. *Thomas v. City of Chattanooga*, 398 F.3d 426, 429, 432 (6th Cir. 2005). There is no evidence that a policy making official of the City ever authorized or condoned the illegal seizure of a license or other conduct. There is no evidence of a direct causal link between a municipal policy or custom, or even to support the existence of a policy, and the alleged constitutional deprivation which allegedly caused injury to Petitioners. *City of Canton v. Harris*, *supra*, 489 U.S. 378 (1989); *Stemler v. City of Florence*, 126 F.3d 856, 864 (6th Cir. 1997), cert. denied, 118 S. Ct. 1796 (1998).

Petitioner Aureus offered no probative evidence of the existence of genuine issues of material facts in support of its contentions. Aureus only made colorable conclusory allegations and failed to create a genuine issue of material fact that an unconstitutional de facto policy or custom of failure to follow procedures, to failure to renew license, or policy of harassment existed so as to defeat the City's motion for summary judgment. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Petitioners failed to establish a custom of tolerance or acquiescence of failing to follow procedure as required in *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005). Petitioners failed to present significant probable evidence to support his claim of an illegal custom that resulted in the deprivation of his rights. See *Anderson v. Liberty Lobby, Inc.*, *supra*, at 477 U.S. 242, 249, 252. Petitioners must show a

clear and persistent pattern of similar illegal or unconstitutional conduct and that the custom was the cause of the constitutional violation. *Thomas*, *supra,* at 432. None of the evidence established a practice, custom or de facto policy that was so common or widespread or illegal as to have the force of law that was unconstitutional. See *Gregory v. Shelby County*, 220 F.3d 433, 441-442 (6th Cir. 2000).

The district court reviewed the facts and record evidence. It correctly noted that Aureus argued that "Dockery, Fuqua, Lett" all lower level employees failed to follow the City policy for license revocation and renewals. However, there was no evidence that any City official capable of creating policy condoned said practices, and approved them or had knowledge of Dockery's, Fuqua's, or Lett's revocation. (Pet. App. C, p. 50a). Sending a letter copied to the Mayor does not show that they condoned or were deliberately indifferent to the rights of Aureus in this context. Petitioners did not demonstrate that the municipal action was taken with deliberate indifference of obvious consequences. A showing of negligence or heightened negligence will not suffice. *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 407 (1997).

Petitioners cannot assert that the City of Detroit did not follow proper procedures. There is no protected interest in the procedure itself. See *United of Omaha Life Ins. Co. v. Solomon*, 960 F.2d 31 (6th Cir. 1992) (holding that a disappointed bidder to a government contract did not have a property interest in the state's

purchasing guidelines and so suffered no due process violation when the State failed to comply with its own procedures in awarding the bid). See also *LRL Properties v. Portage Metro Housing Authority*, 55 F.3d 1097, 1110 (6th Cir. 1995).

Detroit City Code § 30-1-1 et seq. sets forth the specifics of obtaining any license to do business in the City of Detroit. Detroit City Code § 49-8-1 deals with "Scrap Iron and Metal Processors" specifically. The City ordinance requires each business location to have a license before advertising (§ 30-1-4) and have the license on display. (§ 30-1-11). The ordinance also allows City officials to inspect the business premises and to deny, suspend or revoke business licenses in appropriate circumstances. (§ 30-1-16). One of the appropriate circumstances is in the case in which a business constitutes a hazard or threat to the peace, health, safety or welfare of the people. (§ 30-1-16(b)(2)(d)).

Petitioners' principle complaint for denial of due process is based on the alleged revocation of the business license by John Fuqua from the Department of Consumer Affairs on December 20, 2002. However, the ordinance does not create a protected liberty interest under the constitution sufficient to give rise to cause of action by Aureus. In *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454 (1989); *City of Canton v. Harris*, *supra*. (No violation when the regulations gave the official the discretion to exclude visitors if the official believed that a visitor would constitute a probable danger the visitor had no

protected liberty interest.) Petitioners cannot point to an aspect of the code that states a substantive limitation on Respondents when an environmental hazard existed and one is operating without a license. See *Pushy v. City of Youngstown*, 11 F.3d 652 (6th Cir. 1993) (the state crime victims act required notice to victims of the trial of the perpetrator, but because the statute did not mandate a specific result, if notice was not given: no liberty interest was created).

The Detroit ordinance at issue contains specific provisions with general grounds warranting denial, revocation or suspension for such generalized reasons as the business "constitutes a public nuisance" or "constitutes a hazard or threat to the peace, health, safety or welfare of the people of the city." (§ 30-1-16(b)(2)(a); § 30-1-16(b)(2)(d)). Likewise, the City ordinance specifies the procedure by which the licensee must be notified of a license suspension or revocation, but does not mandate a specific action by the City in the absence of the notice, or a specific entitlement of the licensee. Petitioners never challenged the constitutionality of the regulations. Significantly, Petitioners failed to show that Respondents' actions were arbitrary or capricious, in the sense that they have no substantial relation to the public health, safety, morals or general welfare. See *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1223 (6th Cir. 1992) (the court addressed a zoning ordinance, which principles are applicable here to determine if actions are arbitrary).

Altaire Builders, Inc. v. Village of Horseheads, 551 F. Supp. 1066 (W.D. N.Y. 1982), does not undermine the decision of the Sixth Court of Appeals in the instant case. The case demonstrates how Petitioners' facts and evidence, to prove a custom or de facto policy in the instant case, were insufficient to create a genuine issue of material fact or even colorable facts or evidence of a de facto policy. The case is clearly distinguishable from the instant case. In *Altaire*, the Board, a group of policy makers, made a decision not to approve the project and to take certain actions. In the instant case, there was no evidence of a policy maker from the City that made a decision to continually deny or ignore a request for a hearing.

Reed v. Village of Shorewood, 704 F.2d 943 (7th Cir. 1983), does not demonstrate that the decision of the Sixth Circuit was erroneous or that it conflicts with *Monell*. It is important to point out that the jury determined that Dockery was not liable for intentional interference with Aureus's business relations or for malicious prosecution (Pet. App. A, p. 7a, Pet. App. B, pp. 21a, 24-25a). Therefore it cannot be argued Dockery illegally interfered with Aureus's business as alleged by the Chief of Police in *Reed*. Further in *Reed* the court found that a genuine issue of material fact existed and that it had sufficient fact to show that the Village of Sherwood took acts that reflected governmental policy. In *Reed* there was no discussion of the existence of a de facto policy or custom as Petitioners argue in the instant case. In the instant case the court found that Petitioners did not raise a

genuine issue of material fact of the existence of a de facto policy. In the instant case, sending a letter to the Director of Consumer Affairs and Industry Services and a copy to the mayor does not show that the "policy makers were deliberately indifferent to their rights and had a custom of violating the rights of Petitioners or establish knowledge of a custom of wrongdoing. Petitioners' claim against the City was properly dismissed.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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